MEMORANDUM

From: AMC Staff[†]

To: All Commissioners

Date: July 11, 2006

Re: Immunities and Exemptions Discussion Memorandum

The Commission adopted for study the issue of immunities and exemptions. In particular, it sought to study two specific questions:

1. Should antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited?

2. Should the antitrust exemptions for exporters set forth in the Webb-Pomerene Act and Title III of the Export Trading Company Act be eliminated?

It received suggestions to study these issues from, among others, the Section of Antitrust Law of the American Bar Association,[1] then-Assistant Attorney General R. Hewitt Pate,[2] and the Senate Judiciary Subcommittee on Antitrust.[3]

[†] This memorandum is a summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

[1] Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission, at 3 (Sept. 30, 2004).

[2] Letter from R. Hewitt Pate, Assistant Attorney General, Department of Justice Antitrust Division, to Deborah A. Garza, Chair, Antitrust Modernization Commission, at 3 (Jan. 5, 2005).

[3] Letter from Senators Mike DeWine & Herb Kohl, to Deborah A. Garza, Chair, Antitrust Modernization Commission, at 4 (Jan. 5, 2005).

The Commission accordingly requested comment on the following issues related to immunities and exemptions on May 19, 2005.[4]

1. In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions?
    a. What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?
    b. Should Congress analyze different types of immunities and exemptions differently? Are those that do not protect core anticompetitive conduct (*e.g.*, price fixing) preferable to those that exempt all joint activities? Are those that eliminate, for example, treble damages, but retain single damage liability acceptable? For example, does the National Cooperative Research and Production Act, 15 U.S.C. §§ 4301-06, provide a helpful alternative approach to blanket exemptions?
    c. Should Congress subject immunities and exemptions to a "sunset" provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?
    d. Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?[5]
2. The Commission intends to conduct a general evaluation of antitrust immunities and exemptions, and currently contemplates focusing, for illustrative purposes, on the first eight immunities and exemptions listed below (a-h). Please provide any relevant information about any of the immunities and exemptions listed below, including their costs, benefits, and impact upon commerce.
    a. Capper-Volstead Act. 7 U.S.C. §§ 291-92.
    b. Non-profit agricultural cooperatives exemption. 15 U.S.C. § 17.
    c. Agricultural Marketing Agreement Act. 7 U.S.C. §§ 608b, 608c.
    d. Fisherman's Collective Marketing Act. 15 U.S.C. §§ 521-22.
    e. Webb-Pomerene Export Act. 15 U.S.C. §§ 61-66.
    f. Export Trading Company Act. 15 U.S.C. §§ 4001-21.
    g. McCarran-Ferguson Act. 15 U.S.C. §§ 1011-15.
    h. Shipping Act. 46 U.S.C. app. §§ 1701 *et seq.*[6]

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[4] This memorandum does not address the Commission's questions regarding the state action doctrine and *Noerr-Pennington* immunity.

[5] 70 Fed. Reg. 28,902, 28,905 (May 19, 2005).

[6] Appendix A contains summaries of all of the comments received for those immunities and exemptions listed in items a. through ee. as to which comments were received.

The Commission held a hearing regarding immunities and exemptions, consisting of three panels, on December 1, 2005. The first panel, which addressed the Export Trading Company Act, had a single witness, John J. Sullivan, General Counsel of the U.S. Department of Commerce. The second panel consisted of two witnesses, Professor Darren Bush, University of Houston Law Center, and Gregory K. Leonard, Vice-President at NERA Economic Consulting. The third panel consisted of Alden F. Abbott, Associate Director for Policy and Coordination, Federal Trade Commission; Professor Peter C. Carstensen, University of Wisconsin Law School; James C. Miller III, then Chairman of CapAnalysis (and former FTC Chairman); and Professor Stephen F. Ross, University of Illinois College of Law. In addition, FTC Chairman Deborah Platt Majoras and Assistant Attorney General for Antitrust Thomas O. Barnett addressed immunities and exemptions during the hearing on March 21, 2006.[7]

The Commission received comments from seven entities that addressed the general topic of statutory immunities and exemptions.[8] In addition, the Commission received 32 comments regarding the Export Trading Company Act,[9] six comments regarding the McCarran-Ferguson

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[7] All citations to "Trans." are to the AMC hearing on immunities and exemptions held on December 1, 2006, unless otherwise noted.

[8] *See* Comments of Carl Olson (June 24, 2005); The American Antitrust Institute (July 15, 2005) ("AAI Comments"); American Farm Bureau Federation (July 15, 2005) ("AFBF Comments"); Professor Peter C. Carstensen (July 15, 2005) ("Carstensen Comments"); National Small Shipments Traffic Conference, Inc. (July 15, 2005); United States Telecom Association (July 15, 2005) ("USTA Comments"); American Bar Association, Antitrust Section (Nov. 30, 2005) ("ABA Comments").

[9] *See* Comments of Eleanor Roberts Lewis and Jeffrey Anspacher, Department of Commerce (Feb. 15, 2005); Richard Gilmore (March 1, 2005); Grant Aldonas, Under Secretary for International Trade (March 10, 2005)); J.B. Penn, Under Secretary for Farm and Foreign Agriculture Services (May 19, 2005); Committee to Support U.S. Trade Laws (June 14, 2005); China Trade Development Corporation (June 19, 2005); U.S. Shippers Association (June 20, 2005); Northwest Fruit Exporters (June 21, 2005); American Natural Soda Ash Corporation (June 28, 2005) ("ANSAC Comments"); California Kiwifruit Commission & California Kiwifruit Exporters Association (July 7, 2005); National Chicken Council (July 7, 2005); California Dried Fruit Export Association (July 8, 2005); USA Poultry & Egg Export Council

Act,[10] 11 comments regarding the Capper-Volstead Act or the Agricultural Marketing Agreement Act,[11] one comment regarding the Newspaper Preservation Act,[12] four comments regarding the Shipping Act,[13] and five comments regarding railroad immunities.[14] In addition, the Commission received a report from three consultants appointed by the Commission to

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(July 8, 2005); Wood Machinery Manufacturers of America (July 10, 2005); American Cotton Exporters Association (July 11, 2005); Phosphate Chemicals Export Association (July 11, 2005); National Association of Manufacturers (July 12, 2005); Corn Refiners Association (July 13, 2005); The Rice Economics Group (July 13, 2005); American Commodity Company (July 14, 2005); Association for the Administration of Rice Quotas, Inc. (July 14, 2005); Far West Rice, Inc. (July 14, 2005); U.S. Apple Association (July 14, 2005); Water & Wastewater Equipment Manufacturers Association, Inc. (July 14, 2005); American Pork Export Trading Company (July 15, 2005); Joint Export Trade Alliance (July 15, 2005) ("JETA Comments"); Mutual Trade Services (July 15, 2005); National Foreign Trade Council, Inc. (July 15, 2005); Outdoor Power Equipment Institute (July 15, 2005); Paperboard Export Association of the United States (July 15, 2005); US Rice Producers Association (July 15, 2005); United States Surimi Commission (July 15, 2005).

[10] *See* Comments of Vehicle Information Services, Inc. (July 13, 2005) ("VIS Comments"); American Insurance Association (July 15, 2005); National Council on Compensation, Inc. (July 15, 2005); Office of the Attorney General of New York State (July 15, 2005) ("NY AG Comments"); Property Casualty Insurers Association of America re McCarran-Ferguson Act (July 15, 2005); Comment of the American Bar Association, Antitrust Section re: McCarran-Ferguson Act (April 10, 2006).

[11] *See* Comments of Professor Willard Mueller (July 5, 2005); Katy Coba, Director of the Oregon Department of Agriculture (July 13, 2005); Randal K. Stoker (July 14, 2005); Professor Bruce Anderson (July 15, 2005); Keith Collins, Chair of USDA Capper-Volstead Committee (July 15, 2005) ("USDA Comments"); Congressional Farmer Cooperative Caucus (July 15, 2005); Professor Michael L. Cook (July 15, 2005); National Council of Farmer Cooperatives (July 15, 2005); National Farmer's Union (July 15, 2005); National Milk Producers Federation (July 15, 2005) ("NMPF Comments"); Perennial Ryegrass Bargaining Association (July 15, 2005).

[12] *See* Comments of Newspaper Association of America (July 13, 2005).

[13] *See* Comments of Intermodal Motor Carriers Conference (July 15, 2005); World Shipping Council (July 15, 2005) ("WSC Comments"); World Shipping Council (August 22, 2005 ("WSC Suppl. Comments"); Comment of the American Bar Association, Antitrust Section re: Shipping Act (March 17, 2006) ("ABA Shipping Act Comments").

[14] *See* Comments of Joint Comments by Alliance for Rail Competition et al. (July 15, 2005); Western Coal Traffic League (July 15, 2005); National Motor Freight Traffic Association, Inc. (July 22, 2005); Southern Motor Carriers Rate Conference, Inc. (July 23, 2005); American Association of Railroads (August 30, 2005).

develop a proposed framework for Congress to use in considering proposed immunities and exemptions.[15]

This memorandum briefly addresses background material on immunities and exemptions and then discusses the comments and testimony received, as well as other relevant materials, relating to the Commission's first question (including subparts) on which it requested public comment. Comments received in response to the Commission's second question, which asked for information about 31 separate immunities, are discussed in Appendix A to this memorandum.

I. Background

As a general matter, the antitrust laws apply to all areas of commerce except certain regulated industries. This reflects a strong national policy favoring competition.[16] In response to certain political, social, or other concerns, however, Congress on occasion has enacted specific immunities and exemptions from the antitrust laws that permit conduct that otherwise might create liability under those laws.[17] Indeed, immunities from the antitrust laws are nearly as old as the Sherman Act. Both the statutory labor exemption and the non-profit agricultural cooperatives exemption were passed in 1914, as part of the Clayton Act.[18] Most recently, Congress passed the medical resident matching program exemption in 2004.[19]

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15 Darren Bush, Gregory K. Leonard, and Steven F. Ross, "A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions" (Oct. 24, 2005) ("Framework").

16 *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); *see* Framework, at 1.

17 *See* Framework, at 1; *see also* ABA Section of Antitrust Law, *Antitrust Law Developments*, at 1213 (5th ed. 2002) ("*Antitrust Law Developments*").

18 *See* 15 U.S.C. § 17.

19 *See* 15 U.S.C. § 37b.

A. Examples of Different Types of Exemptions.

For simplicity, this memorandum uses the terms "immunity" and "exemption" interchangeably and broadly to mean any statutory provision or judicial doctine that makes liability or damages under the antitrust laws less than fully applicable. Through the years, different types of immunities have developed. Major categories are described below.

Broad immunity for broad scope of activities in particular areas. Examples of this type of exemption include the exemption for the business of insurance, the labor exemption, and the shipping exemption. The McCarran-Ferguson Act grants an exemption to "the business of insurance" to the extent it is regulated by state law, unless the conduct involves an agreement or act "to boycott, coerce, [or] intimidate."[20] The statutory labor exemption "enables workers to organize to eliminate competition among themselves, and to pursue their legitimate labor interests, so long as they do not combine with a non-labor group."[21] The Shipping Act exempts agreements filed with the Federal Maritime Commission in which shipping "conferences"—that is, groups of competing ocean liner shipping companies—formally agree to specific terms of service, including fixing rates.[22]

Broad immunity for particular activities of certain types of organizations. Examples include the Capper-Volstead Act, the Webb-Pomerene Act, and the Export Trading Company Act. The Capper-Volstead Act provides antitrust immunity for persons engaged in the production of agricultural products acting together in associations to process, prepare, handle, or market such products, unless the conduct would violate Section 2 of the Sherman Act or "unduly

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20 *See generally Antitrust Law Developments*, at 1369-75.

21 *Id.* at 1375. *See generally id.* at 1375-78.

22 *See generally id.* at 1429-31. This Act was amended in 1998 to provide, among other things, the opportunity for individual shipping companies to compete with conferences.

enhance" prices of agricultural products.[23] The Webb-Pomerene Act provides an exemption to Sherman Act provisions for associations formed solely to engage in export trade, on the condition that the association is not adversely affecting competition in the United States.[24] Analogously, Title III of the Export Trading Company Act of 1982 creates a procedure by which any person engaged in export trade may request a certificate of review from the Secretary of Commerce that confers partial antitrust immunity, so long as the applicant establishes that its export trade and methods of operation will not adversely affect competition in the U.S. The standards to obtain a certificate are similar to those of the Webb-Pomerene Act, except that a certificate can cover the export of services, including the licensing of technology.[25]

Broad immunity for limited conduct. Examples include antitrust immunity for certain agreements between domestic and foreign airlines;[26] the Charitable Donation Antitrust Immunity Act, which gives antitrust immunity to charitable institutions that fix the annuity rate for gift annuities or charitable remainder trust agreements;[27] and the Defense Production Act, which provides antitrust immunity for conduct undertaken in developing or carrying out a voluntary agreement or plan of action for the President that is necessary for the defense of the United States.[28]

Limited immunity for broad conduct. Examples include the Local Government Antitrust Act, which precludes antitrust damage actions against local governments or private

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23 *See generally id.* at 1246-50.

24 *See generally id.* at 1159-61.

25 *See generally id.* at 1161-63.

26 49 U.S.C. §§ 41308-09, 42111. This immunity covers a variety of agreements, including those between foreign and domestic airlines that allow individual airlines to provide tickets that include legs served only by other airlines.

27 15 U.S.C. §§ 37-37a.

28 50 U.S.C. app. § 2158.

persons whose conduct is directed by a local government;[29] the National Cooperative Research and Production Act ("NCRPA"), which provides for rule of reason assessment and limits antitrust damages to actual damages for joint ventures for the purpose(s) of research, development, or production, if the joint venture has first been notified to the DOJ and the FTC;[30] and the Standards Development Organization Advancement Act, which basically provides for the same treatment of standards development organizations as for joint ventures under the NCRPA.[31]

Limited immunity for limited conduct. Examples include the Health Care Quality Improvement Act, which provides immunity from antitrust damages (but not from equitable relief) for physicians participating in professional peer review bodies in which they review other physicians' conduct;[32] the Need-Based Educational Aid Act, which provides a limited antitrust exemption to certain joint actions taken by higher education institutions regarding awards of financial aid to students;[33] and the Soft Drink Interbrand Competition Act, which provides a limited antitrust exemption for the grant of exclusive territories to soft drink bottlers by soft drink trademark holders.[34]

B. The Political Economy of Immunities and Exemptions

Many agree that the creation of antitrust immunities and exemptions is possible due to the disparity in the nature of the benefits they bring and the costs they impose.[35] The benefits of

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29 15 U.S.C. §§ 34-36.

30 15 U.S.C. §§ 4301-06.

31 15 U.S.C. §§ 4301-05, 4301 note.

32 42 U.S.C. §§ 11101-52.

33 15 U.S.C. § 1 note.

34 15 U.S.C. §§ 3501-03.

35 *See, e.g.*, ABA Comments, at 4-5.

immunities generally apply to small, concentrated interest groups.[36] By comparison, their costs are diffuse, typically passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.[37] The concentrated benefits provide incentives for interested parties to seek immunities from Congress, whereas the diffuse costs are often sufficiently minimal that consumers are unlikely to oppose the creation of immunities.[38]

II. Discussion of Issues

In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions?

The testimony varied, depending whether the subject was immunities in general or a specific exemption. No witnesses or commenters advocated the creation of new exemptions. A number of Commission witnesses and commenters vigorously opposed the existence and creation of antitrust exemptions as a general matter.

For example, the ABA Section of Antitrust Law expressed inherent skepticism toward exemptions and immunities,[39] stating that "[w]hatever their expressed purposes, antitrust exemptions often impair consumer welfare."[40] Judge Easterbrook has explained:

> [Such] legislation [is] a single-industry exception to a law designed for the protection of the public. When special interests claim that they have obtained favors from Congress, a court should ask to see the bill of sale. . . . What the industry obtained, the courts enforce; what it did not obtain from the legislature—even if similar to something within the exception—a court should not bestow. . . . Recognition that special interest legislation enshrines results rather

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36 *See id.* at 4.

37 *See id.* at 4-5.

38 *See id.* at 5-6; AAI Comments, at 3.

39 *See* ABA Comments, at 2.

40 Comments of ABA Section of Antitrust Law on FTC Report Re State Action Doctrine, at 2-3 (May 6, 2005).

> than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.[41]

Others expressed additional criticisms of immunities in general:

- An economy based on vigorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy; laws that authorize departures from the competitive model should be disfavored.[42]

- Exemptions limit price and other forms of competition, which the antitrust laws are designed to protect.[43] They lower economic welfare because they can produce an economically inefficient level of output,[44] impose restrictions on entry,[45] or foster cartels.[46]

- Industries sheltered from competition do not perform as well as those that are subject to vigorous competition.[47] Ultimately, immunities handicap the economic progress of industries they are intended to protect.[48]

- Immunities often are not the least restrictive mechanism to achieve the intended policy goal.[49]

- Immunities create confusion by "exempting" activities that bear no risk of antitrust liability.[50]

Nonetheless, numerous commenters did support specific existing immunities,[51] and several commenters and witnesses articulated one or more of the following rationales in favor of immunities.

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41 *Chicago Professional Sports v. National Basketball Ass'n*, 961 F.2d 667, 671-72 (7th Cir. 1992).

42 *See* Alden F. Abbott, Prepared Statement on Statutory Immunities and Exemptions, at 2 (Dec. 1, 2005) ("Abbott Statement"); Trans. at 80 (Abbott).

43 *See* Paul G. Cassell, *Exemption of International Shipping Conferences from American Antitrust Laws: An Economic Analysis*, 20 New Eng. L. Rev. 1, 12 (1984) ("Cassell, *Shipping*"); Peter C. Carstensen, Antitrust Immunities and Exemptions, at 15 (Dec. 1, 2005) ("Carstensen Statement"); Abbott Statement, at 3; ABA Comments, at 2-3.

44 *See* Cassell, *Shipping*, at 12.

45 *See* Abbott Statement, at 3.

46 *See id.*

47 *See id.* at 4; ABA Comments, at 2-3.

48 *See* Abbott Statement, at 4.

49 *See* Cassell, *Shipping*, at 13.

50 *See* Carstensen Statement, at 8; Abbott Statement, at 6-7.

- Immunities can promote economic, social, or political goals.[52]
- Immunities can enable an industry to avoid "ruinous price competition," stabilize rates, and preserve firms that would otherwise go out of business.[53]
- Immunities can help offset buyer power through the creation of comparable seller power.[54]
- Immunities can create legal certainty about the lawfulness of certain conduct and thus enable their beneficiaries to avoid legal costs.[55]

More detailed responses to the Commission's question about the circumstances in which Congress should provide immunities and exemptions, and the limitations that should be applied, are described in the subsections below.

A. What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?

1. Methodology proposed by the ABA Antitrust Section

The ABA Antitrust Section proposes that any decision to allow an exemption should "be made reluctantly and only after thorough consideration of each particular situation."[56] A

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51 *See supra* nn. 8-14 (citing comments generally supportive of specific immunities).

52 *See* Cassell, *Shipping*, at 11-16; *Antitrust Law Developments*, at 1213.

53 *See* Cassell, *Shipping*, at 11-16; Testimony of John J. Sullivan, General Counsel, United States Department of Commerce, Before the Antitrust Modernization Commission, at 1, 3 (Dec. 1, 2005) ("Sullivan Statement").

54 *See* Carstensen Statement, at 3-5.

55 *See* Sullivan Statement, at 1, 3; ANSAC Comments, at 3 ("legal certainty is critical for continued joint export trade") Trans. at 43 (Sullivan) ("[T]here are substantial burdens that are faced. . . . To lessen [the risk of those burdens], there is a substantial cost that is incurred. . . . [I]t's a serious cost to reduce that risk, to get an opinion letter from a law firm or from—to provide the type of assurance that a business would need before venturing—even if it's conduct that would be—that we would think was clearly not covered by the antitrust laws, it is a substantial risk for a business to risk treble damages liability and substantial attorneys fees."). Other witnesses argued that immunities and exemptions are needed only when there is a real risk of antitrust liability in their absence. *See* Carstensen Statement, at 8; Abbott Statement, at 6-7; Trans. at 68 (Leonard) (immunities are not justified when they immunize already lawful conduct).

56 *See* ABA Comments, at 1.

proposed exemption should be recognized as a decision to sacrifice competition and consumer welfare and should be allowed only when a countervailing value outweighs the presumption in favor of competition.[57] Claims that a proposed exemption is necessary for competition to work should be rejected, they contend, but claims that a value unrelated to competition trumps the need for competition should be considered.[58]

According to the ABA Antitrust Section, immunity decisions should be based on the "rigorous and consistent application" of three principles:

- Congress should grant antitrust immunities rarely and only after careful consideration of the impact of the proposed immunity on consumer welfare.
- Congress should grant only those immunities that are narrowly drafted, so that competition is reduced only to the minimum extent necessary to achieve the intended goal.
- Congress should grant immunities only when they achieve a Congressional goal that trumps the aims of the antitrust laws in a particular situation.[59]

The ABA Antitrust Section also proposes two procedural safeguards:

- Proponents of an immunity must submit evidence demonstrating that the need for competition is less important than the value promoted by the immunity and the proposed immunity is the least restrictive means to achieve that value.
- Congress should consult with and receive comments from the FTC and the DOJ before legislating any new immunity.[60]

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57 *See id.* at 1-2.

58 *See id.* at 3.

59 *See id.* at 7-10; *see also* Prepared Statement of James C. Miller III Before the Antitrust Modernization Commission, at 3 (Dec. 1, 2005) ("I see little reason to hold onto any of thse antitrust immunities/exemptions from a strictly economic standpoint.") ("Miller Statement).

60 *See* ABA Comments, at 10-11.

2. Methodology proposed by the Framework

The AMC appointed three consultants[61] to develop a possible framework for Congress to use in assessing calls for a new immunity or exemption (the "Framework"). That Framework has five general steps.

(1) Initial information gathering, which would include seeking input from a broad range of sources, a written record, and public hearings.[62]

(2) Identification of the justifications for the immunity, including both competition (*e.g.*, claims that the immunity will lower costs or increase the quality of production) and non-competition justifications (*e.g.*, social benefits).[63]

(3) Balancing of costs and benefits.[64]

(4) Tailoring the immunity to minimize anticompetitive effects.[65]

(5) Creation of mechanisms for periodic revaluation through renewal requirements.[66]

Commission witnesses and commenters identified the following pros and cons with respect to the Framework proposed by the AMC consultants, and, for some, with respect to any type of general framework.

<u>Pros</u>

- The framework is generally applicable.[67]
- Gathering information from a broad range of sources and through various means—including public hearings—is vital for sound policy and well-reasoned decision-making.[68]

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61 The three consultants were Darren Bush, Assistant Professor of Law, University of Houston Law Center; Gregory K. Leonard, Vice President, NERA Economic Consulting; and Stephen F. Ross, Professor, University of Illinois College of Law.

62 *See* Framework, at 6-8.

63 *See id.* at 8-16.

64 *See id.* at 16-32.

65 *See id.* at 32-35.

66 *See id.* at 35-38.

67 *See id.* at 17-18; Trans. at 60 (Leonard).

68 *See* Framework, at 4, 6-7 (information regarding the immunity and its effects should be sought from a broad range of sources including proponents of the immunity, relevant government entities, and opponents and other interested parties); *see also* Trans. at 101 (Ross);

- Ensuring that the information gathered is available to all interested persons enables identification of any errors or omissions in the record, facilitates more input to Congress, and provides context regarding the purpose and scope of the immunity at issue.[69]

- Undertaking a generally accepted method of analysis,[70] such as cost-benefit analysis, can identify the benefits and costs to consumers, companies advocating for the immunity, and other affected entities.[71] Properly done, such an analysis identifies the groups affected, the types of benefit or harm they may receive, and quantitative and qualitative measures of the expected magnitude of the benefit or harm, as well as distributional issues.[72] This increases the likelihood that only socially beneficial immunities are granted[73] and establishes a "decision tree" that Congress and the President should use in deciding "whether antitrust immunities or exemptions make sense."[74]

- Limiting immunities to instances where there are no less restrictive alternatives means that consumer harm resulting from immunities is minimized.[75] Drafting immunities narrowly to permit only the anti-competitive conduct necessary to reach the social goal helps in this regard.[76]

- Codifying all immunities in a single section of Title 15 of the United States Code would promote transparency and provide an easily accessible compilation of antitrust immunities at any time.[77]

Trans. at 103 (Miller); Trans. at 103 (Abbott); Trans. at 103 (Carstensen); Trans. at 62-63 (Bush) (To do a "full and complete . . . analysis, more information is better. So we have in there provisions that allow for the acquisition of information from a variety of sources."); AFBF Comments, at 1 (combined economic, structural, and social impacts of immunities and exemptions should be examined).

69 *See* Framework, at 4; *see also* AAI Comments, at 3-4; Trans. at 101 (Ross); Trans. at 103 (Miller); Trans. at 103 (Abbott); Trans. at 103 (Carstensen).

70 *See* Framework, at 16; *see also* Trans. at 60 (Leonard).

71 *See* Framework, at 5, 19-20; *see also* Carstensen Statement, at 2; Trans. at 101 (Ross); Trans. at 103 (Miller); Trans. at 103 (Abbott); Trans. at 103 (Carstensen).

72 *See* Framework, at 20; *see* Trans. at 58 (Leonard).

73 *See* Framework, at 17-18; *see also* Trans. at 60 (Leonard).

74 Trans. at 82 (Miller); Trans. at 77 (Carstensen) ("has a great deal of merit to it").

75 *See* Framework, at 32; *see also* Cassell, *Shipping*, at 13.

76 *See* Framework, at 32; *see also* ABA Comments, at 8.

77 *See* Framework, at 4; *see also* Carstensen Statement, at 14; Trans. at 101 (Ross); Trans. at 103 (Miller); Trans. at 103 (Abbott); Trans. at 103 (Carstensen); Trans. at 116-17 (Miller) ("[M]y suspicion is that members of Congress don't really know that they have all these exemptions out there; they don't know. And putting them all in one place, and bringing it to their attention, I think, is going to be a very useful thing."). Many immunities are scattered

- Providing a substantial legislative history of an immunity provides a baseline against which to compare the assumptions and conditions at the time of passage with the data obtained subsequently.[78]

Cons

- It may not be possible to quantify all of the benefits and costs associated with a proposed immunity.[79]
- Because exemptions vary greatly and should be construed within the specific facts and circumstances of an industry, a common methodology will lead to "divergent analyses and results."[80]
- Proponents of particular exemptions opposed the framework as likely to rule out their exemption.[81]

3. Other general approaches

Several commenters proposed general approaches to immunities and exemptions, although they did not term them as frameworks or methodologies. Rather, these approaches suggested ways in which generally to reduce the impact and/or number of statutory immunities and exemptions.

a. Narrow judicial construction

Several commenters proposed that the Commission encourage a narrow construction of all immunities. One approach would encourage courts to construe all exemptions against the

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throughout various sections of Title 15 of the U.S. Code, while others are found in Titles 7, 16, 42, 46, 47, 49, and 50.

The Office of the Law Revision Counsel is generally charged with codifying statutes passed by Congress in the location within the U.S. Code it deems most appropriate. *See* 2 U.S.C. § 282b(4); *see also* uscode.house.gov/about/info.shtml (describing duties of Office).

78 *See* Framework, at 6.

79 *See id.* at 18.

80 WSC Comments, at 8.

81 *See, e.g.*, USDA Comments, at 2-3; JETA Comments, at 4-5; NMPF Comments, at 11-14; WSC Comments, at 8-10.

beneficiaries,[82] arguing that this would provide incentives to Congress to be clear in drafting immunity statutes and would restrict their more expansive interpretation.[83] (Courts already do construe antitrust immunities narrowly and in favor of application of the antitrust laws.[84] As the Supreme Court has explained, "our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly."[85])

A second proposed approach is for Congress to adopt a statutory rule of construction similar to that adopted in Wisconsin or Connecticut.[86] A Wisconsin statute makes "competition the fundamental economic policy of th[e] state" and requires regulatory agencies to "regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature."[87] Connecticut's statute declares that the state's antitrust law will not apply only if the "activity is specifically directed or required by a statute of this state, or of the United States."[88] Courts in both jurisdictions have used this legislation to limit claims of antitrust immunity.[89]

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82 *See* Carstensen Statement, at 13.

83 *See id.*; *see also* ABA Comments, at 8-10.

84 *See Union Labor Life Ins. Co.*, 458 U.S. 119, 126 (1982); *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 508 (4th Cir. 2005) ("The Supreme Court has consistently construed the reach of exemptions from antitrust laws narrowly."); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999) ("exceptions to the antitrust laws must be narrowly construed").

85 *Union Labor Life*, 458 U.S. at 126; *see also Chicago Professional Sports*, 961 F.2d at 671-72 (Easterbrook, J.).

86 *See* Carstensen Statement, at 13.

87 *Id.* at 13 (*citing* Wi. Stat. 133.01).

88 *Id.* at 14 (*citing* Conn. G.S.A. sec. 35-31(b)).

89 *See id.* at 14.

b. FTC evaluation of immunities

One witness proposed charging the FTC with overseeing all exemptions not expressly linked to an administrative agency and conferring on the FTC the power to terminate the exemption after a period of years, if it finds that the exemption has not or is no longer serving its stated goals.[90] Congress would still be free to reenact the exemption if it chose to.[91]

Alternatively, the FTC could conduct studies of each immunity and then make recommendations to eliminate those that do not serve a legitimate purpose. FTC Chairman Majoras testified that such studies are very resource-intensive, but that the FTC would consider undertaking such studies if given sufficient resources to study them. [92]

Finally, regardless of whether the FTC (or DOJ) undertakes studies of existing immunities, several commenters argued that either the Antitrust Division or the Federal Trade Commission (or both) should provide assessments of the effects of proposed immunities to Congress.[93] (It appears, however, that DOJ and FTC already informally provide their views on proposed immunities to Congress (as well as formally when called upon to do so).[94])

c. Enhance business review letter process

One witness argued that, rather than seeking antitrust exemptions for conduct that the antitrust laws likely permit, the business community should make more extensive use of the

90 *See id.* at 12.

91 *See id.*

92 March 21, 2006, Hearing Trans. at 64 (Majoras); *see also id.* at 65 (Barnett) (noting resource-intensive nature of such studies).

93 *See* Framework, at 6; Trans. at 96-97 (Ross); *see also* ABA Comments, at 11.

94 *See* March 21, 2006, Hearing Trans. at 64 (Majoras) (FTC works behind the scenes to discourage numerous immunities while in their legislative incipiency).

business review letter process of the Antitrust Division and the FTC.[95] He suggested that "the AMC may want to consider whether the current procedures for considering and granting such reviews provide sufficient opportunity for other stake holders to have an effective voice in the review process and whether any need exists to reduce further any residual risks of antitrust liability."[96] He further stated that, if necessary, the business review procedure should be reformed to reduce any unreasonably high costs and to increase its transparency.[97]

d. Immunity from or limitation to damages as alternatives to complete exemptions

One commenter proposed that Congress should, when it decides to create an exemption, choose to limit civil remedies, rather than shield conduct from the antitrust laws entirely.[98] For instance, exemptions that reduce treble damages to single damages may provide the relief needed, without unduly limiting the ability of the antitrust laws to combat anticompetitive behavior.[99] Two examples of such an approach are the National Cooperative Research and Production Act and the Standards Development Organization Act, both of which provide for only actual damages for conduct taken in accordance with the acts' terms.[100]

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95 *See* Carstensen Statement, at 7-9. Carstensen made this suggestion in the context of the Shipping Act exemption with respect to legitimate joint ventures to share capacity and legitimate information sharing to coordinate shipping schedules, both of which he considered likely to receive business review clearances from the DOJ. *Id.*

96 *Id.*

97 *See id.* at 7-9.

98 *See* ABA Comments, at 9-10.

99 *See id.*

100 15 U.S.C. §§ 4301-06; 15 U.S.C. § 4301 (note).

B. Should Congress analyze different types of immunities and exemptions differently?

One commenter, the ABA Antitrust Section, specifically stated that different types of exemptions "should not be analyzed differently: rather, the same exacting review should be applied to all requests for immunity, with the particular facts and circumstances of each case considered carefully."[101]

Other commenters and witnesses suggested various categorizations of immunities that may help to focus particular attention on those most deserving of reconsideration or elimination.

1. Grouping by current relevance

One commentator, Peter Carstensen, proposes to categorize exemptions into four groups—the "irrelevant," the "unnecessary," the "actually harmful," and the "possibly helpful but in need of modernization."[102] He identifies examples in each group:

- The Irrelevant: Anti-Hog Cholera Serum Act (hog cholera has been eliminated), Year 2000 Information and Readiness Disclosure Act (year 2000 is past), Defense Production Act (never used), and Fishermen's Collective Marketing Act (construed out of existence).[103]
- The Unnecessary: Shipping Act (old systems are obsolete), Soft Drink Interbrand Competition Act (wealth transfer has been completed), Newspaper Preservation Act (ineffective in goals), and Surface Transportation Board regulation of intercity busline mergers (no significant industry remains).[104]
- The Actually Harmful: Surface Transportation Board regulation of railroads (allows anticompetitive mergers and perpetual restraints), electric power immunities (no effective remedy against collusion), and Agricultural Marketing

101 *See* ABA Comments, at 2.

102 *See* Peter Carstensen, Presentation at ABA Antitrust Section Program, The Antitrust Modernization Commission at Mid-Course (June 9, 2006).

103 *Id.*

104 *Id.*

Agreement Act (authorizes cartels that exploit consumers but provide no real gain to farmers, especially in milk).[105]

- The Possibly Helpful but in Need of Modernization: McCarran-Ferguson Act (value in safe harbors), Sports Broadcasting Act (increases availability of broadcasting of major sports but may facilitate exploitation of market power), Professional Football League Merger Act (same), Local Government Antitrust Act (avoids damage liability but creates aura of exemption for anticompetitive conduct), exemptions for transportation industry (stronger business review clearance could be useful), and Capper-Volstead Act (some exemption may be needed for purely bargaining cooperatives).[106]

2. Framework approach

The Framework identifies three general possible justifications for immunities: (1) pro-consumer justifications; (2) justifications not related to consumer welfare; and (3) giving an existing regulator complete control of all competitive issues regarding the firms it regulates.[107] Some immunities may serve more than one of these purposes. The Framework points out key issues to consider with regard to each justification.

a. Pro-consumer justifications

The Framework argues that some immunities may be justified on the ground that the immunized conduct would enhance consumer welfare, through lower prices or improved product quality.[108] The Framework notes that, because the immunity is sought from antitrust laws designed to promote consumer welfare, "a valid pro-consumer justification for an immunity from these very laws would likely be limited to cases where the conduct in question may create antitrust liability . . . even though research and experience has demonstrated that conduct to be

105 *Id.*

106 *Id.*

107 *See* Framework, at 8-9.

108 *See id.* at 8.

pro-consumer."[109] Such justifications have been advanced for a variety of immunities. For example, the National Cooperative Research and Production Act is justified as allowing firms to achieve to lower costs of production, distribution, or marketing, which can be passed through to consumers in the form of lower prices.[110] Similarly, the Standards Development Organization Advancement Act is justified by some on the grounds that it will lead to new products, higher quality products, wider distribution, or more effective promotion.[111] The Export Trading Company Act is supported by the argument that it allows small producers to create joint ventures that promote exports and thereby reduce transportation and marketing expenses.[112]

The key issues to analyze with respect to immunities purportedly advancing such goals are:

- The relationship between the immunized conduct and the final price paid by consumers.[113]
- The relationship between the immunized conduct and the benefit in terms of new products, higher quality products, wider distribution, or more effective promotion.[114]

b. Justifications not related to consumer welfare

The Framework argues that other immunities may provide a subsidy to a particular group, promote what Congress deems socially desirable redistribution of wealth from one group to another, or promote other activity deemed socially desirable.[115] Because Congress is entitled to make social and political judgments about the extent to which competition is in the public

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109 *Id.*

110 *See* 15 U.S.C. §§ 4301-06; Framework, at 10.

111 *See* Framework at 10-11; *see also* 15 U.S.C. §§ 4301-06.

112 *See* Sullivan Statement, at 1.

113 *See* Framework, at 10.

114 *See id.* at 11.

115 *See id.* at 12.

interest, it may determine that other social values trump the aims of the antitrust laws.[116] Witnesses and commenters, as well as the Framework, identified several immunities as potentially falling within this category.

- *Immunities enacted to provide a balance against buyer power*. Monopsony can lower prices paid to producers, which may cause an underinvestment in production. One commenter argued that allowing a counter to such power, in the form of legalized producer coordination, can give producers continued incentives to invest in their business.[117] Moreover, the argument continues, because such immunities create a closer balance between the negotiating positions of sellers and buyers, producers may capture a larger share of the rents created by production.[118] The Capper-Volstead Act, for example, generally allows agricultural producers to create cooperatives for selling their production.[119]

- *Prevention of ruinous competition.* In some industries, such as ocean liner shipping, proponents of immunities have asserted that special cost and capacity problems make it impossible for the industry to arrive at efficient levels of supply, so an immunity is needed to prevent "ruinous competition" that would otherwise lead to monopoly or oligopoly and unstable prices.[120] The Shipping Act exemption has been justified as preventing such competition and thus preserving firms that would otherwise go out of business.[121]

- *Promotion of viewpoint diversity.* The Newspapers Preservation Act is intended to promote editorial diversity, which is deemed to be socially desirable for reasons apart from enhancing consumer welfare.[122]

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116 *See* ABA Comments, at 10; *see also* Framework, at 9 (noting potential justification).

117 Carstensen Statement, at 5.

118 *See id.* at 5-6 ("it is important to consider the potential positive contributions to producer welfare that may arise from exemptions where buyer power is a major problem and where it is not feasible to facilitate a more workably competitive market context."); Framework, at 12; *see also* Mueller Comments, at 2 (agricultural cooperatives do not obtain significant market power so their use of the immunity poses little problem for competition).

119 *See* 7 U.S.C. §§ 291-92.

120 *See* Cassell, *Shipping*, at 11 (noting, but rejecting, argument); ABA Shipping Act Comments, at 12.

121 46 U.S.C. app. §§ 1701-19; *see* Cassell, *Shipping*, at 11-14 (liner conferences avoid "ruinous competition" and unstable rates).

122 *See* 15 U.S.C. §§ 1801-04; Newspaper Association Comments, at 9-10 (Act preserves editorial and reportorial competition); *see also* Framework, at 14.

- *National security, free speech, and federalism*. One commenter identified national security, free speech, and federalism concerns as possible reasons for immunities.[123]

The Framework submits that the key issue to analyze is the trade-off between the social goal achieved by the immunity and other economic or social goals, including the goals achieved through competition.[124]

c. Immunities to advance a regulatory regime

The Framework states that an industry subject to a regulatory regime may also merit an immunity. According to the Framework, an immunity may be appropriate when the regulator, rather than Congress or the judicial process, is best suited to balance the goal of consumer welfare against other social goals or to determine whether certain conduct within a particular industry is procompetitive or anticompetitive.[125] Alternatively, such an immunity may be appropriate when the existence of antitrust laws precludes the desired results of regulation.[126]

Opponents to this justification, however, point out that regulators are susceptible to capture by the industries they are supposed to be regulating, and typically do not have the expertise in analyzing antitrust issues that antitrust enforcers have.[127]

This topic is more fully addressed in the Discussion Memorandum for Regulated Industries.

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123 *See* ABA Comments, at 10 (citing *Noerr-Pennington* and state action doctrines).

124 *See* Framework, at 13-14.

125 *See id.* at 9.

126 *See id.* at 9, 15.

127 *See id.* at 9, 15; *see also* ABA Comments, at 6.

C. Should the proponents or opponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?

Several commenters, as well as the AMC consultants' Framework, argued that the burden of justifying any immunity should fall on the proponents of that immunity because they "are in an inherently unique position to provide that information as to the relative merits of the immunity."[128] Under this approach, the proponent of an immunity would have the burden to explain why conduct within the scope of a proposed immunity is both in the public interest and unlawful under the antitrust laws; estimate the ancillary effects of the proposed immunity; and demonstrate that the immunity is necessary to achieve the desired policy outcome.[129] This burden would also require the proponent to show there is no less restrictive alternative to achieve the benefits of the exemption.[130]

One commenter (writing in support of a particular immunity) proposed to place the burden of proof on whomever seeks to change existing law.[131] Accordingly, for new immunities, proponents would bear the burden of proof; for existing immunities, those seeking to eliminate the immunity would correspondingly bear the burden of proof.[132]

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128 Trans. at 63 (Bush); *see also* Framework, at 4-5; Carstensen Statement, at 2; Abbott Statement, at 2, 6; Trans. at 62-63 (Bush); Trans. at 85 (Carstensen); Trans. at 101 (Ross); Trans. 103 (Miller); Trans. at 103 (Abbott); Trans. at 103 (Carstensen); VIS Comments, at 1; ABA Comments, at 11, 15-17.

129 *See* Framework, at 4-5, 32. The ABA points out that in the European Union, the burden of proof is imposed on the proponent of an immunity as a matter of law. *See* ABA Shipping Act Comments, at 3 n.6 (citing Treaty Establishing the European Economic Community, Art. 85(3) 298 U.N.T.S. 11 (Mar. 25, 1957)). The Treaty of Rome establishes competition rules, and any proposed exemption must meet four "quite restrictive" conditions to deviate from "the basic principle of free competition." *See id.*

130 *See id.* at 5; *see also* Trans. at 101 (Ross); Trans. at 103 (Miller); Trans. at 103 (Abbott); Trans. at 103 (Carstensen); ABA Comments, at 10-11.

131 *See* WSC Comments, at 11-12.

132 *See id.*

Opponents of placing the burden of proof on the proponent of the immunity argue that Congress is sufficiently capable of reviewing and verifying its own policy goals, and placing the burden on the proponent implies a policy preference towards eliminating immunities.[133]

Congress, however, unlike the courts, does not measure levels of proof. Rather, it evaluates the merits of proposed legislation and votes on whether to adopt it. As a practical matter, anyone proposing legislative change bears a burden of convincing a majority of both houses of Congress to adopt the change. Accordingly, the concept of a "burden of proof" may not translate well to a legislative arena.

D. Should Congress subject immunities and exemptions to a "sunset" provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?

Several AMC commenters and witnesses, including the AMC consultants' Framework, argued that all statutory antitrust immunities should terminate after a set period of time, unless specifically renewed.[134] Most of those commenters and witnesses would also amend existing immunities to include sunset provisions.[135] Under this approach, Congress would be obliged to determine whether to renew each immunity on a regular basis.[136] Others argue against the

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133 *See* NMPF Comments, at 13-14.

134 *See* Framework, at 5, 36; *see also* Carstensen Statement, at 10; Trans. at 101 (Ross); Trans. at 103 (Miller); Trans. at 103 (Abbott); Trans. at 103 (Carstensen); VIS Comments, at 1; NY AG Comments, at 1; ABA Comments, at 14-15; AAI Comments, at 4. One commenter suggested than when an exemption is part of a program where an agency has oversight, Congress should give that agency a clear goal of maximizing the role of the market and competition in the operation of the industry, and give the agency the discretion to modify or terminate the exemption if it no longer serves the intended goals. *See* Carstensen Statement, at 10.

135 *See* Framework, at 5, 36; *see also* Carstensen Statement, at 10; Trans. at 122-23 (Abbott).

136 *See* Framework, at 5; AAI Comments, at 4.

imposition of sunset provisions.[137] Commenters and witnesses viewed the following as relevant pros and cons of a "sunset" approach.

Pros

- Allows Congress to take into account changed circumstances that may make an immunity socially harmful.[138]
- Helps ensure that the information, assumptions, and other factual bases for granting the immunity still justify its existence.[139]
- Helps ensure that immunity-granting legislation is interpreted in accordance with Congressional intent.[140]
- Promotes Congressional oversight of agency action, which is a useful safeguard where an exemption's implementation is delegated to industry-specific agencies that may be susceptible to capture.[141]
- Allows Congress to restudy an issue regularly, leading to more frequent input from interested groups.[142]

Cons

- Regular inclusion of sunset provisions may make it easier for Congress to adopt exemptions on the pretense that they will be reconsidered.[143] In reality, it may be difficult to fail to renew exemptions due to pressure from interest groups.[144] Indeed, the same political forces that gave rise to the immunity in the first place are likely to remain when an immunity comes up for renewal.

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137 *See* Carstensen Statement, at 10; ANSAC Comments, at 9; AFBF Comments, at 2; WSC Comments, at 10-11; JETA Comments, at 5-6; NMPF Comments, at 12-13.

138 *See* Framework, at 35-36; Abbott Statement, at 6; Trans. at 92 (Miller); ABA Comments, at 14-15. Having a sunset provision allows Congress to see whether "the immunity actually has somehow transformed the industry, if more [efficient] behaviors are now engaged in because of the immunity." Trans. at 69 (Bush).

139 *See* Framework, at 35-36; *see also* ABA Comments, at 14-15.

140 *See* Framework, at 36.

141 *See* ABA Comments, at 14-15.

142 *See* Trans. at 107 (Ross).

143 *See* Carstensen Statement, at 10.

144 *See id.*

- Sunset provisions will destabilize cooperatives or joint ventures formed pursuant to the immunity and more generally would impair realization of the benefits of the exemption.[145]

- Any sunset provision that applied to existing immunities could upset settled expectations and harm beneficiaries who have acted in reliance on the existence of the immunity.[146]

- Costs of renewal—both financial and in terms of uncertainty—would be burdensome to beneficiaries of the exemptions.[147]

- Sunset provisions create a presumption of repeal, which is inappropriate.[148]

Commenters did not address in particular specificity the length of the sunset period. The AMC consultants' Framework proposed a sunset period of five years, with shorter or slightly longer sunset provisions appropriate in certain circumstances.[149] Others argue that exemptions should be limited to ten years, similar to the typical duration of the antitrust consent decrees used by FTC and DOJ, on the ground that the conditions of most markets change substantially within that time period.[150]

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145 *See* WSC Comments, at 10-11.

146 *See* ANSAC Comments, at 9; AFBF Comments, at 2; WSC Comments, at 10-11.

147 *See* ANSAC Comments, at 9; AFBF Comments, at 2; WSC Comments, at 10-11.

148 *See* JETA Comments, at 5-6; NMPF Comments, at 12-13; WSC Comments, at 10-11.

149 *See* Framework, at 37.

150 *See* Carstensen Statement, at 10.